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In The

Supreme Court of the United States

October Term, 1979

No. 79-1703

ALDEN J. FULKERSON,
Appellant,

vs.

THE STATE BAR OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

MOTION TO DISMISS OR AFFIRM

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Appellee, The State Bar of California, pursuant to rule 16 of the Rules of the Supreme Court of the United States, moves to dismiss or affirm the final judgment of the Supreme Court of California in this case. Should the court in the alternative treat the appeal as a petition for writ of certiorari as requested by appellant,

Jurisdictional Statement at 3, it is respectfully submitted that the petition be denied.

As grounds for appellee's motion it is respectfully urged that the question presented to this court is so unsubstantial as not to warrant further argument, and presents no federal issue.

I

STATEMENT

This is a direct appeal from a judgment of the Supreme Court of California denying what was denominated Petition to Review Actions of the Board of Governors of The State Bar of California (Rule 952(c)) and For Writ of Mandate (hereinafter cited as petition).

There were no lower court proceedings. In his petition, appellant sought to have the Supreme Court review the action of the Board of Governors of the State Bar in entering into a contract with a legislative advocacy firm. By the terms of the contract the legislative advocacy firm would assist the State Bar in the development and achievement of its legislative program before the California State Legislature in Sacramento.

The State Bar is a public corporation. It is established as a constitutional agency under the judicial branch of government. All persons licensed to practice law in California are members of the State Bar. California Constitution, art. IV, sec. 9. All property of the State Bar is held for essential public and governmental purposes in the judicial branch of government, and all income therefrom is exempt from taxation. California Business and Professions Code sections 6008 and 6008.2.

The State Bar of California was initially integrated in 1927 pursuant to statute. California Stats. 1977, ch. 34. See California Business and Professions Code sections 6000 to 6206.

All State Bar functions are public as established by California law. Constitutional, statutory, rule and decisional duties fall into several categories, among which the principal ones are:

1. The State Bar, in the exercise of its constitutional duties, appoints four members of the Judicial Council and two members of the Commission on Judicial Performance. California Constitution, art. VI, sec. 6, 8.

2. The State Bar is the administrative arm of the Supreme Court of California. Brotsky v. State Bar 57 Cal.2d 287, 300 (1962). The State Bar is charged with the administration, implementation and enforcement of legislative and Supreme Court standards governing admission to practice law, e.g., Cal. Bus. & Prof. Code, §§ 6046, 6060-6066; Cal. Rules of Court, rule 957; In re Admission to Practice Law, 1 Cal.2d 61 (1934), the discipline of persons admitted to practice and those who would seek readmission after disbarment or resignation, e.g., Cal. Bus. & Prof. Code, §§ 6075-6086.6; Cal. Rules of Court, rules 951-952; Jacobs v. State Bar, 20 Cal.3d 191 (1977), mod. 20 Cal.3d 316a (1977); Chronicle Publishing Co. v. Superior Court, 54 Cal.2d 548 (1960); In Re Walker, 32 Cal.2d 488 (1948). The State Bar must administer, implement and enforce programs ordered by the California Supreme Court concerning specialization, Bar Misc. No. 3339 (1971), and practical training of law students, Bar Misc. No. 4089 (1978).

3. The State Bar is charged with enforcing the state law relating to unlawful practice of law and unlawful solicitation of professional employment. Cal. Bus. & Prof. Code, §§ 6030, 6125-6131, 6150-6154.

4. The State Bar is charged with the administration, implementation and enforcement of state law governing law corporations. Cal. Bus. & Prof. Code, §§ 6160-6172; Cal. Corp. Code, § 10830; pt. IV, div. 3, tit. I of Cal. Corp. Code (commencing at § 13400, et seq.).

5. The State Bar is required to assist the California Law Revision Commission, Cal. Gov. Code, § 10307, and it aids in all matters pertaining to the advancement of science of jurisprudence and to the improvement of justice in California. Cal. Bus. & Prof. Code, § 6031.

6. The State Bar or a designated agency of the State Bar is required to evaluate the judicial qualifications of all potential appointees and nominees for judicial office who are nominated by the Governor of California pursuant to subdivision (d) of section 16 of article VI of the California Constitution. Stats. 1979, ch. 534, § 2 (adding Cal. Gov. Code, § 12011.5). The State Bar is also required to establish and promulgate rules and procedures regarding the investigation of the qualifications of candidates for judicial office. Stats. 1979, ch. 534, § 2(e).

7. The State Bar is required to establish, maintain and administer a system

and procedure for the arbitration of disputes concerning fees charged for professional services by members of the State Bar or by members of the bar of other jurisdictions. Cal. Bus. & Prof. Code, §§ 6200-6206.

These functions are supported principally from membership fees. The fees are established by the California legislature. See Cal. Bus. & Prof. Code, §§ 6140-6145.

In 1979 the legislature amended section 6140 to provide that it would remain in effect only through January 1, 1981.[1]

Under this present statutory scheme the State Bar is compelled annually to submit its budget to the legislature and the legislature must each year establish the maximum amount of membership fees that can be collected by the State Bar. Cal. Bus. & Prof.

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[1] California Business and Professions Code section 6140, as amended Stats. 1979, ch. 1041, and as pertinent here, reads:

> 6140. (a) The board shall fix the annual membership fee as follows:
>
> [Herein are listed various membership classification fees.]
>
> (d) This section shall remain in effect only until January 1, 1981, and as of that date is repealed. (Amended by Stats. 1979, Ch. 1041, effective January 1, 1980.)

Code, § 6140.3. The effect of this is that legislative action is required yearly to fund the State Bar's performance of its many public responsibilities.

It is absolutely essential to the State Bar's continued existence and the performance of its many public duties that a fee bill be enacted for the years following 1980. For this reason the Board determined to employ a legislative advocate to assume the primary responsibility of representing the State Bar before the legislature on matters relating to annual membership fees and in such capacity to cause the introduction and advocacy of and seek the passage of legislative bills pertaining to membership fees.

The Board of Governors approved the legislative advocate's contract at its January 18, 1980 meeting, and on February 11, 1980 appellant petitioned the Supreme Court to review that action. In the petition, as pertinent to the proceeding before this court, appellant requested the California Supreme Court to review the actions of the Board of Governors in entering into the legislative contract. Appellant urged among several contentions that the contract to employ a legislative advocate resulted

in an unauthorized expenditure of membership dues in violation of his first amendment rights, and asked that the contract be declared null and void. He cited Abood v. Detroit Board of Education, 431 U.S. 209; 97 S.Ct. 1782; 52 L.Ed.2d 261 (1977) (hereinafter cited as Abood) in support of his points.

On February 26, 1980, appellee, The State Bar of California, filed with the California Supreme Court its pleading entitled State Bar Response to Petition to Review Actions of the Board of Governors of The State Bar of California (Rule 952(c)) and For Writ of Mandate (hereinafter cited as State Bar response).

In the State Bar response it was argued, as pertains to this proceeding, that it was unclear from the petition as to what were appellant's real objections to the legislative contract. It was pointed out that the State Bar had an obligation to seek in the California legislature to maintain an adequate financial basis for its public responsibilities. Further, it was argued, California statutory law invested clear and broad discretion in the Board of Governors with respect to administration of the affairs of the State Bar and attainment of

its purposes, and to enter into necessary contracts, the State Bar had maintained a legislative program since its inception in 1927; and the employment of a legislative advocate was a valid exercise of the Board's discretion and should not be open to review by the court.

It was further argued in the State Bar response that appellant's reliance on Abood is misplaced, that lobbying for a fee bill by the State Bar is a lawful activity of the State Bar and is necessary and germane to its existence and to the continuation of the public services it performs.

On February 29, 1980, appellant filed a one and a half page letter in reply (hereinafter reply) to the State Bar response. Appellant again urged that the lobbying contract "should be voided based on the Abood case."

On March 20, 1980, the Supreme Court of California by minute order ruled: "Petition for writ of review and/or mandamus is denied." A copy of the court minute order was included as appendix A in appellant's Jurisdictional Statement.

There was no written opinion by the California Supreme Court.

II

ARGUMENT

THE QUESTION PRESENTED TO THIS COURT IS SO UNSUBSTANTIAL AS NOT TO WARRANT FURTHER ARGUMENT AND PRESENTS NO FEDERAL ISSUE.

The Jurisdictional Statement contains no real prayer for relief, so it is difficult to determine just what petitioner is seeking from this court. See Jurisdictional Statement at 25-26.

However, in the court below he asked that the legislative contract be declared "void." Petition at 19. Assuming arguendo that some constitutional right of appellant's might have been violated by the Board of Governors spending a portion of his membership fees to enter into a contract with the legislative advocate, a point that appellee does not concede, under Abood the correct remedy would not be a declaration that the contract is void, but a judgment for a prorated refund of that portion of appellant's fees that were improperly spent. Abcod, supra, 431 U.S. at 242; 97 S.Ct. at 1803.

It must be pointed out, however, that appellant expressly seeks no return of fees or damages, Jurisdictional Statement at 20,

and recognizes that such an award could seriously impair the financial operations of a state bar. Jurisdictional Statement at 21.

Appellant asserts that the question he is presenting to the court for determination is: "Whether the integrated State Bar of California, created and governed by State law, has the right to enter into a contract for legislative advocacy (on matters yet unknown) and spend mandatory dues for that purpose over the objection of one member?" Jurisdictional Statement at 7 (emphasis added).

Appellee submits that unless this court is prepared to decide that any and all contracts for legislative advocacy entered into by The State Bar of California, pursuant to California law, are invalid, whatever the subject matter of such advocacy might be, there is no justiciable issue before the court.

In the petition to the Supreme Court of California, the denial of which is the basis for this appeal, appellant stated:

> The State Bar has hired a lay lobbying group for two years. Cutting through the window dressing in the contract, the main thrust of the non-lawyer lobbyist is to influence the

> the Legislature regarding the 1980 State Bar dues bill. Using membership dues to politically influence legislative votes to assess and/or increase membership dues is on its face illogical.

Petition at 10.

In that petition appellant recognized that lawyers have a role in the legislative process. Petition at 12. He recognized that one of the reasons for the integration of the bar in 1927 was to provide expert input of lawyers into the legislative process, petition at 11, and he asserted that the State Bar should provide members of the legislature on a "pro bono" basis analysis of legislative proposals. Petition at 12. He appeared to object to the State Bar's hiring a "non-lawyer lobbyist" to advocate the 1979 fee bill, petition at 11, and to the contract for the advocacy of the 1980 fee bill, petition at 12, and to what he deemed to be the apparent lack of success of those efforts. Petition at 11-12. He also objected to the State Bar's employment of "young inexperienced lawyers who are experienced lobbyists" to advocate other State Bar bills. Petition at 12.

Thus, it was not clear in the proceeding below whether petitioner objected to the State Bar's having any legislative program,

having a program with a paid nonlawyer lobbyist, having a program with paid lobbyists who are young, inexperienced lawyers, or having a program that included a fee bill.

The Jurisdictional Statement fails to set forth with any particularity any specific legislative proposal the State Bar has supported to which appellant has objected or to which he now objects. However, he does state at page 8 of the Jurisdictional Statement: "The 1980-81 State Bar contract for lobbying deals with legislative advocacy in connection with the State Bar dues bill and other unspecified proposed bills sponsored by the State Bar and/or others."

By reason of the foregoing, it is surmised that appellant objects to The State Bar of California engaging a nonlawyer legislative advocate for, among other purposes, legislative enactment of an appropriate membership fee bill.

It is submitted that The State Bar of California has ample authority under California law to maintain a legislative program. Further, the retention of a legislative advocate for the purpose of assisting in the enactment of that program is a proper exercise of power by the Board of Governors. This is so even though one

of the elements of that legislative program is the enactment of a statutory membership fee bill necessary to enable the State Bar to carry out its public obligations.

The action of the Board of Governors in entering into the contract with the legislative advocate was valid under state law, and is not subject to review by this court absent some interference with an overriding federal constitutional privilege of appellant.

Appellant relies on Abood to establish that interference with federal constitutional privilege. We respectfully submit that appellant's reliance on Abood is misplaced.

Assuming arguendo that Abood would apply to the legislative activities of a state bar and is not limited to the trade union field in which it arose, a close analysis of the decision compels the rejection of petitioner's first amendment claim.

In Abood, this court addressed the issue of whether a union's use of compulsory dues for purposes unrelated to the causes for which the organization was formed (i.e., collective bargaining) violates the first and fourteenth amendment rights of those members who oppose the use of their dues for such

purposes. In Abood, a number of teachers filed a class action against the Detroit Board of Education (hereinafter cited as the Board), the Detroit Federation of Teachers (hereinafter cited as the Union) and several Union officials. The suit was the result of the enactment of legislation by the State of Michigan authorizing a system for union representation of local governmental employees. Following a secret ballot election, the Union was certified pursuant to Michigan law as the exclusive representative of teachers employed by the Board of Education. The Union and the Board thereafter concluded a collective bargaining agreement, and among its provisions was an "agency shop" clause requiring every teacher who had not become a Union member within 60 days of hire to pay the Union a service charge equal to the regular dues required of Union members or be subject to discharge. Abood, supra, 431 U.S. at 212-213; 97 S.Ct. at 1787-1788.

The complaint filed by the teachers alleged that they were unwilling or had refused to pay dues and that they opposed collective bargaining in the public sector. They further alleged in their complaint that the Union was engaged:

> [I]n a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they have no voice, and which are not and will not be collective bargaining activities...

Abood, supra, 431 U.S. at 213; 97 S.Ct. at 1788.

In upholding the union shop concept and reaffirming its earlier decisions in Railway Employees' Dept. v. Hanson, 351 U.S. 225; 76 S.Ct. 714; 100 L.Ed. 1112 (1956) and International Association of Machinists v. Street 367 U.S. 740; 81 S.Ct. 1784; 6 L.Ed. 2d 1141 (1961), the Court stated:

> To be required to help finance the union as a collective bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. [Fn. omitted.] But the judgment clearly made in Hanson and Street is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. 'The furtherance of the common cause leaves some leeway for the leader-

> ship of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.'

Abood, supra, 431 U.S. at 223; 97 S.Ct. at 1793. (Emp. added.)

The court then addressed the constitutional issues presented by the use of compulsory union shop dues for political and ideological purposes unrelated to collective bargaining (the cause which justified bringing the union together). In holding that the application of compulsory union dues to causes unrelated to collective bargaining violated the first and fourteenth amendment rights of those individuals opposed to such causes, the court stated:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or towards the advancement of other ideological causes not germane to its duties as collective bargaining representative. [Fn. omitted.] Rather, the Constitution requires only that such expenditures be financed fron charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Abood, supra, 431 U.S. at 235-236; 97 S.Ct. at 1800. (Emp. added.)

Thus, the court in Abood held that the application of compulsory dues (such as those paid annually by members of the State Bar) to causes which are germane or related to the causes which justified bringing the group together (such as those causes set forth in the State Bar Act) do not violate the constitutional rights of freedom of speech and of association of those members opposed to such causes.

It is respectfully submitted that the test of Abood is whether or not the dues-supported activities of any organization of mandatory membership are relevant, pertinent, related or germane to the purposes of the body. If the dues are in fact imposed for purposes germane to the organization and existence of The State Bar of California, then there can be no objection. Further, the financial support of the State Bar is required by all California lawyers admitted to practice without violating the first admendment of the Constitution of the United States since the dues benefit both the profession and the public. Again, the "test" is further exemplified when the court said "[A]s long as they act to promote the cause which justified

bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." Abood, supra, 431 U.S. at 223; 97 S.Ct. at 1793.

There can be nothing more germane or central to the State Bar's existence or the public purposes which it serves than a stable financial base. It is clear that that financial base is wholly dependent upon the fees fixed by the legislature, and, under present California law, if the State Bar is to continue to exist and to perform those public functions, annual legislative action on a State Bar fee bill is essential.

III
CONCLUSION

Wherefore, appelle respectfully submits that the question presented to this court is so unsubstantial as not to warrant further argument, and presents no federal issue.

Appellee respectfully moves the court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of California.

Respectfully submitted,

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